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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 698

FRANK SEIDEN, MILTON SEIDEN and LEON SEIDEN,

Petitioners,

against

JESS LARSON and PAUL L. MATHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
A. Nature of the Action	3
B. The Facts Essential to This Petition	3
C. The Justification Claimed for Respondents' Conduct	5
D. The Adjudication Below	5
Specification of Errors to Be Urged	6
Reasons for Granting the Writ	7
Argument	8
POINT I—The first ground of decision below is in conflict with a number of cases in this Court where similar specific relief was granted despite title in the sovereign	8
POINT II—The second ground of decision below is in conflict with *Larson* v. *Domestic & Foreign Commerce Corp.*	13
A. The holding of the *Larson* case does not extend to an error of law by the officer in construing his own statutory authority	13
B. Congress delegated to the Administrator the power to make determinations of fact, not of law	15

PAGE

C. Here respondent was acting clearly outside the scope of his authority 20

D. The fact that it may be said that respondent did not act unreasonably has no bearing on whether the suit is against the United States .. 23

POINT III—The matter may be fully disposed of on appeal 25

Conclusion 25

Appendix A. Statutes 1a

CITATIONS

Arenas v. U. S., 322 U. S. 419..... 24

Board of Liquidation v. McComb, 92 U. S. 531..... 9

Colgate-P.-P. v. N. L. R. B., 338 U. S. 355..... 24
Crittenden v. Rolston, 120 U. S. 390.....8, 10
Cunningham v. Macon, etc. Co., 109 U. S. 446..... 12

Land v. Dollar, 330 U. S. 731.....12, 24
Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682.....6, 7, 9, 11, 13, 14, 15, 20, 24
Louisiana v. Garfield, 211 U. S. 70..... 12
Louisiana v. Jumel, 107 U. S. 711..... 10

McCarl v. Cox, 8 F. 2nd 669, c.d. 270 U. S. 652..... 9
Miguel v. McCarl, 291 U. S. 442.....9, 23, 25
Mine Safety Appliances Co. v. Forrestal, 326 U. S. 371 12
Minnesota v. Hitchcock, 185 U. S. 373..... 12
Minnesota v. United States, 305 U. S. 382..... 11
Morrison v. Work, 266 U. S. 481..... 12

PAGE

Naganab v. Hitchcock, 202 U. S. 473 12
Noble v. Union etc. Co., 147 U. S. 165 8
North Carolina v. Temple, 134 U. S. 22 10

O'Harra v. Littlejohn, 69 F. S. 274 5
Oregon v. Hitchcock, 202 U. S. 60 12

Payne v. Central, etc. Co., 255 U. S. 228 9
Pennoyer v. McConnaughy, 140 U. S. 1 8
Philadelphia Co. v. Stimson, 223 U. S. 605 9

Santa Fe, etc. Co. v. Fall, 259 U. S. 197 .....9, 23, 25
Securities & Exchange Comm'n v. Chenery, 318 U. S. 80 24
Smith v. Jackson, 246 U. S. 388 9

United States v. Idaho, 298 U. S. 105 19
United States v. Lee, 106 U. S. 196 12

STATUTES

Act of December 31, 1945, c. 657, 59 Stat. 674, 42 U. S. C. Sec. 1572 ..... 22n

Federal Property and Administrative Services Act of 1949, Act of June 30, 1949, c. 288, 63 Stat. 378, 41 U. S. C. Sec. 201 7

Lanham Act, Act of Oct. 14, 1940, c. 862, sec. 1, 54 Stat. 1125, 42 U. S. C. Sec. 1521 22

Surplus Property Act of 1944, Act of October 3, 1944, c. 479, sec. 23, 58 Stat. 777, 50 U. S. C. App. Sec. 1632 .....2, 3, 15, 1a

Surplus Property Act of 1944, sec. 4, 50 U. S. C. App. Sec. 1613 14

28 U. S. C. Sec. 1254 (1) 1

MISCELLANEOUS

PAGE

88 Cong. Rec. 4656 22

89 Cong. Rec. 4396 22

90 Cong. Rec. 7936 21

91 Cong. Rec. 11,624-5, 12,303-4 22

11 Fed. Reg. 2644 ..... 19, 23

Hearings before Subcommittee of the Committee on Public Buildings and Grounds, H. Rep., 78th Cong., 2nd Sess. "Bills relating to Disposition of Surplus Property", p. 3 ..... 21n

House Misc. Reports, 79th Cong., 2nd Sess., Vol. IV, Rep. No. 2337, p. 2 ..... 15n

House Misc. Reports, 79th Cong., 2nd Sess., Vol. IV, Rep. No. 2337 (pp. 3-4) 18n

S. 2065 (1944) 17n

S. Rep. 1286 accompanying Housing Act of 1950, 2 U. S. Cong. Service for 1950 at p. 2048 20

"Summary of Recommendations Submitted on Surplus Property Legislation" by War Contracts Committee to Senate Committee on Military Affairs, 78th Cong. 2nd Sess., Senate Subcomm. Print No. 5, June 5, 1944 21n

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the Supreme Court and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its final judgment herein (R. 83).

Opinion Below

The opinion of the Court of Appeals (R. 75-82) is as yet unreported. The District Court wrote no opinion.

Jurisdiction

The final judgment of the Court of Appeals was entered on March 15, 1951 (R. 83). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

The Court of Appeals gave judgment to respondents on the ground that this is an action against the United States. The questions on which the Court of Appeals ruled and which are here presented are:

1. Where plaintiffs who have standing to sue seek to restrain an officer from disposing of land in a manner different than that which Congress has specifically directed, is the suit nevertheless against the United States if (a) title to the land is in the United States and (b) plaintiffs' ultimate objective is to acquire that land?

2. Where plaintiffs who have standing to sue seek to restrain an officer from disposing of land in a manner different than that which Congress has specifically directed, is the suit nevertheless against the United States if the officer acts contrary to the statutory mandate because of an error of law on his part in construing the statutory mandate?

The Court of Appeals answered both questions affirmatively and, therefore, it did not rule on the following two questions which present the merits:

1. Was petitioners' property "war housing" and so within the exception to the former owners' preference created by the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, sec. 23, 58 Stat. 777, 50 U. S. C. App., sec. 1632?

2. If petitioners' former property was not "war housing" have petitioners, by virtue of expiration of the Surplus Property Act while this action was pending, lost the preference to which they were entitled when the officer offered the land for sale and when this action was instituted?

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1a to 3a.

Statement

A. Nature of the Action

Petitioners seek to restrain respondents from conducting a public sale of petitioners' former real property unless such sale is made subject to the statutory preference granted to former owners under the Surplus Property Act of 1944 (R. 4-6). Petitioners' standing to sue, under that Act, is conceded by the Court of Appeals (R. 77).

The Act, devised primarily to govern disposition of World War II surplus, provides as follows with respect to real property acquired by the United States after December 31, 1939: "when [such surplus real] property is to be disposed of by the United States" the former owner "shall be given notice" and "shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person at private sale at any time during the period of ninety days following such notice" (App. A. 2a). The re-acquisition price is fixed at the price paid by the United States to the owner when the United States took the property, increased to the extent of any improvements since made and decreased to the extent of any damage since done to the property (*id.* 3a).

B. The Facts Essential to This Petition

Petitioners, prior to September 8, 1942, owned the Lido Beach Club, a completely integrated summer resort, situated at Lido, Long Island. The premises consisted of 169 continuous acres, on which there were a hotel, an ocean beach, a golf course, swimming pools, tennis courts and many other facilities (R. 11-4).

On September 8, 1942, the Navy seized possession of the premises and instituted condemnation proceedings through which the United States acquired title in April, 1945 (R. 40).

After the war, the Navy ceased using the property. By revocable lease, it allowed the United Nations to use the southerly 54 acres on which the clubhouse or hotel stood and by revocable permit it allowed the New York State Housing Division to take over the northerly 115 acres so that it might alter certain cinder-block barracks which stood on a part of that area for temporary, emergency veterans' post-war housing (R. 15, 42).

Thereafter, in May, 1947, the Navy declared the whole parcel surplus as an unit and, under the Act respondent Larson, as Administrator of the War Assets Administration, took control of the property (R. 41).

Shortly thereafter, the United Nations surrendered its portion. Respondent Larson then offered that part for sale, recognized petitioners' priority and resold to them at the statutory price (R. 15-6). The only witness who claims personal knowledge says it was understood, at the time, that at the end of the State's tenure, the other part of the property would be similarly reconveyed (R. 16).

Without going into detail, it may be said that the division of the property cut petitioners' golf course in two. The value of the resort had long been in its integration of facilities (R. 20). Without the course, one of the five best in the world, the resort was dismembered (R. 13).

When, in 1949, respondents decided to sell the northerly part, they refused to recognize petitioners' priority and offered the property to the highest bidder (R. 9, 20-8).

Petitioners do not seek to prevent the sale which respondents elected to make; they do not seek to curtail the State's occupancy period but are ready to buy subject thereto; but they do seek to restrain a sale which puts them on a parity with the general public so that if they are not the highest bidder, they are left with a part of a resort or are required to pay some speculative purchaser a high price to have their property made whole. Congress dictated that they should not be placed in this position.

C. The Justification Claimed for Respondents' Conduct

To the rule of former owners' preference, Congress made certain exceptions, among them being property which, on the date it was declared surplus, constituted "war housing". Respondents claim that the northerly 115 acres were, on May 5, 1947, "war housing".

The Navy had built a number of structures of temporary cinder-block construction both north and south of the road—warehouses, mess hall, dispensary, target ranges, etc. and included were some barracks buildings.

War Assets has ruled that such barracks buildings were not war housing. *O'Harra* v. *Littlejohn,* 69 F. S. 274, 275 (D. C., D. C. 1946). But respondents contend that alterations made by New York State in 1947, two years after the war, made the property "war housing".

Briefly, this is what New York did to the property: within a fenced off area of 23.8 acres, there stood 23 barracks buildings; at a cost of $2,000 a unit, New York partitioned the long barracks halls into compartments, installed plumbing on the inside and erected wooden staircases on the outside to give separate access to each unit; each unit measured overall approximately 28′ x 37′ (R. 10, 32-3, Plf's. Ex. I, Defs.' Exs. D, E). Pictures of the outer structures appear as Exhibit I annexed to the affidavit of Milton Seiden and Exhibit L annexed to that of Israel Flapan. Because no return is necessary on the investment, the apartments rent for $38 a month (R. 35). They are now an eyesore and bear no resemblance to an economic investment and bear no resemblance to the "war housing" which was constructed during World War II (R. 17, 36-7).

D. The Adjudications Below

The District Court, without memorandum or opinion, dismissed the complaint and granted respondents summary judgment.

The Court of Appeals affirmed. It held that since (a) title is in the United States and (b) the "ultimate relief" sought by petitioners "could hardly be obtained without" either affirmative action by the "sovereign" or disposition of sovereign property, this is an action against the United States. The conclusion, we submit, is contrary to the applicable decisions in this Court in that it fails to distinguish between enforcing compliance with specific directions of Congress and compelling action where Congress has given no specific directions.

As "an alternative ground of decision" the Court held that if respondents are acting contrary to statute but so act through "an incorrect decision as to law or fact", the action is against the United States. For this conclusion, the Court relies on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). We submit that again the Court has failed to distinguish between an error of law by respondents in construing the statutory mandate and an error by them as to some common law right connected with action which is within the scope of their statutory authority. In the cited case, the claim was a breach of contract by an officer acting within his delegated powers; here the wrong consists of acting contrary to the mandate of Congress. Thus, again the determination here is in conflict with the applicable decisions of this Court.

Specification of Errors to Be Urged

We beg to refer to the Questions Presented, *supra*. We submit the Court was in error:

1. in holding that this is an action against the United States;
2. in refusing to pass on the merits, and
3. in refusing to enjoin defendants from disposing of petitioners' former property without first offering it to petitioners at the statutory price.

Reasons for Granting the Writ

The Court of Appeals for the District of Columbia has decided a) a federal question and b) a question of general importance in a way probably in conflict with the applicable decisions of this Court.

The Court will note from the cases cited in the opinion of the Court of Appeals and in our Argument that, over a period of years, suits to compel an officer to deal with the sovereign's property in accordance with statute have been plentiful. The fact that the Court of Appeals (in footnote 11, R. 79) also cites several very recent cases in the lower Courts shows the frequent recurrence of the situation.

As the Government's functions have expanded, the property transactions of the United States—acquisition, management and disposition, as well—have multiplied. The Federal Property and Administrative Services Act of 1949, Act of June 30, 1949, c. 288, 63 Stat. 378, 41 U. S. C. Sec. 201, was enacted to cope with the problem. The Government will continue to deal with the individual in matters involving Government property. As the law is laid down by the Court of Appeals, the citizen is without specific redress with respect to such property even though Congress gives the citizen plain, indisputable rights. For, if the incidence of title ends the matter or if the officer by misconstruing the Act ties the hands of the Courts, the citizen deals at his peril; and, often, his dealing, as in the present case, is wholly involuntary.

Again, the opinion below applies even when Government property is not involved if the officer misconstrues the mandate of Congress. This Court, we submit, in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949) established a clear formula to govern the cases of "common law wrongs". But if the doctrine there, that an error of law by an officer who acts within his authority is not remediable, is to be expanded so that an officer who mis-

reads the statutory mandate is also beyond the law, it is new doctrine which will surely lead to serious consequences.

Thus, if, as we believe, the Court of Appeals is in error, it is highly important that the writ be granted, for reversal would not merely rectify a gross injustice here but would clarify the law in the numerous cases in which it is desirable that an officer act as the Statute has directed him to act.

ARGUMENT

POINT I

The first ground of decision below is in conflict with a number of cases in this Court where similar specific relief was granted despite title in the sovereign.

This Court has often granted specific relief against an officer who failed to carry out the statutory mandate, though that relief affected the sovereign's property.

(a) In *Crittenden* v. *Rolston*, 120 U. S. 390 (1887), the State of Missouri held mortgages on railroad property. The action was brought to restrain officers of the State from selling the mortgaged property to others. Appellants' objective was to have the officers assign the mortgages to appellants' designees. Not only did this Court affirm the granting of the injunction but it also directed a determination of whether the facts had occurred upon which "the Governor can be compelled to execute [to petitioner's designees] the assignment which has been provided for [in the Statute]" (p. 411).

(b) In *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891), the decree restrained State officers from selling lands owned by the State in violation of appellee's rights.

(c) In *Noble* v. *Union, etc. Co.*, 147 U. S. 165 (1893), officers of the United States were enjoined from revoking a right of way granted appellee over land belonging to the United States.

(d) In *Payne* v. *Central, etc. Co.*, 255 U. S. 228 (1921), this Court enjoined the Secretary of Interior, *et al.* from cancelling selections of land although title thereto was in the United States and patents from the United States would be required in order that respondent should obtain the title it sought (p. 234).

(e) To the same effect was *Santa Fe, etc. Co.* v. *Fall*, 259 U. S. 197 (1922), in which there is the characteristically lucid opinion of Mr. Justice HOLMES.

The following are cases where mandamus issued to compel an officer to pay money out of the public treasury in order to conform with Statute:

(a) *Smith* v. *Jackson*, 246 U. S. 388 (1918), affirming a comprehensive opinion in 241 F. 747, 762-3 (CCA 5, 1917).

(b) *McCarl* v. *Cox*, 8 F. 2nd 669 (CCA D. C., 1925), c.d. 270 U. S. 652 (1926).

(c) *Miguel* v. *McCarl*, 291 U. S. 442 (1934).

Similar in principle are *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1876), where State officers were enjoined from issuing the State's own bonds, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912), where this Court took jurisdiction of an action to enjoin an officer who was acting under the exclusive federal jurisdiction over navigable waters; relief was denied on the merits.

Thus, where a statute is to be complied with, it should be clear that the incidence of title together with ultimate affirmative action by an officer in order to comply, do not convert the action against the recalcitrant officer to one against the sovereign.

The Court of Appeals, we submit, in reaching its conclusion, misread footnote 11 in the majority opinion and a sentence in the dissenting opinion in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949), hereinafter called the *Larson* case. That footnote reads:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 S. Ct. 509 (1890)."

The Court of Appeals has read the clause "will require affirmative action by the sovereign" as if it read "will require affirmative action by the officer" and the clause "disposition of unquestionably sovereign property" as if it read "disposition by an officer of unquestionably sovereign property".

That this is not what this Court meant in its footnote is apparent from a reading of *North Carolina* v. *Temple*, the case cited in that footnote. There, the State of North Carolina, by legislation and by constitutional amendment, had directed that neither the principal nor the interest on bonds issued in the name of the State in "carpet-bag" days should be paid. Plaintiff-bondholders sued to compel a State officer to levy a tax to pay these bonds despite the statutes and constitutional amendment to the contrary. In dismissing the bill, this Court rested its decision on the authority of *Louisiana* v. *Jumel*, 107 U. S. 711 (1883), where the same situation existed. The ground of decision in those cases is given by Mr. Chief Justice WAITE in *Crittenden* v. *Rolston*, 120 U. S. 390, 411 (1887):

> "It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel*, 107 U. S. 711 (27:448), is cited in support of this position. But this case is entirely different from that. There the effort was

> to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the Trustees when they make a certain payment."

Thus, it is clear that when Mr. Chief Justice VINSON referred, in footnote 11 of the *Larson* case, to affirmative action by the sovereign, he meant just that—*i. e.*, action by Congress and the President—and not affirmative action by an officer who is designated to carry out the statute which the sovereign has already enacted. So, too, by "disposition of unquestionably sovereign property" he meant a disposition for which Congress would have to provide, not a disposition which an officer was clearly required, by Act of Congress, to make. Similarly, the sentence taken by the Court of Appeals from the dissenting opinion of Mr. Justice FRANKFURTER (R. 79) is an iteration that an action cannot be brought *in invitum* against the United States with respect to its property in its possession; it should not be read to mean that where Congress has affirmatively directed a specified disposition of Government property and the officer refuses to carry out the mandate, the mere incidence of title in the United States ties the hands of the courts. Otherwise all the cases we cited at the beginning of this Point would have to be deemed overruled.

The other cases cited and quoted by the Court of Appeals (R. 78-9) are not in point; none of them involves an action against an officer who defies the legislative command. In *Minnesota* v. *United States*, 305 U. S. 382 (1939), Congress had consented that condemnation proceedings might be brought by the State in Federal Courts with respect to land owned by the United States for the benefit of Indians; this Court held that that was not consent to condemnation in a State Court; the clause quoted by the Court of Appeals

(R. 78) from this Court's opinion there meant simply that an *in invitum* suit as to property in which the United States has an interest, as guardian, is a suit against the United States.

In the three *Hitchcock* cases (R. 78) the question was whether an officer who acted pursuant to an Act of Congress could be restrained where appellants claimed conflicting rights had been conferred on them by earlier Acts; the officer was not flouting Congress but conforming to its command.

The quotation (R. 78) from *Land* v. *Dollar*, 330 U. S. 731 (1947), is said to "indicate" that where title is in the United States suit to enforce a right claimed under an Act of Congress cannot be maintained (R. 78). But this Court did not say that. The Court said that it could not go into all the ramifications of *United States* v. *Lee* (p. 737); and that a number of cases in several categories cited by petitioner were distinguishable from *Land* v. *Dollar*. The six cases referred to (330 U. S. 738) did not involve disobedience by an officer. In the *Cunningham* case, no statute had conferred the right plaintiffs claimed and this Court said "No one sued has any personal interest in the matter or any official authority to grant the relief asked" (109 U. S. 446, 457). We discussed the three *Hitchcock* cases in the last paragraph above. In *Louisiana* v. *Garfield*, the Court said Congress had manifestly not granted to the State that which it claimed an Act of Congress had granted it (211 U. S. 70, 77). In *Morrison* v. *Work*, various relief was denied on various grounds, and the Court distinguished cases in which it was sought to enjoin an officer from contravening a statutory direction (266 U. S. 481, 486).

In *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371 (1945), this Court said, through Mr. Justice Black, that "Certainly the action which the Secretary proposed to take is not a violation of any express command of Con-

gress" (p. 374); in fact the action was pursuant to a command of Congress (p. 372).

We respectfully submit that again and again specific relief has been granted despite the incidence of title in the United States and despite the fact that the ultimate interest of the plaintiff was in an affirmative disposition of land by the United States, and that it could not have been intended in the *Larson* case to overturn these precedents when Congress, the sovereign, has acted and it is sought merely to have the officer carry out the mandate of Congress.

If the *Larson* case is construed to grant immunity from suit to Government officers whenever they deal with property of the United States, then a vast field is opened for irresponsibility on the part of such officers. Such a matter is of grave public importance and we respectfully submit that certiorari should be granted.

POINT II

The second ground of decision below is in conflict with *Larson* v. *Domestic & Foreign Commerce Corp.*

A. The holding of the *Larson* case does not extend to an error of law by the officer in construing his own statutory authority.

The Court of Appeals gave an "alternative ground" for holding the suit to be against the United States (R. 79). That ground is that the Administrator was "empowered" by Congress to construe the words "war housing"—normally a judicial function—and if he erred in his construction, that was an error which was within the scope of his authority. For this, the Court quotes from the *Larson* case that it "is no less official action when 'based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so'. 337 U. S. at 695" (R. 82).

Before we refer to the statute to determine whether the Administrator was made a court as well as an administrator (pp. 15-20) and before we cite the uniform definitions of "war housing" (pp. 20-3), it may be well to point out what a far reaching extension of the *Larson* doctrine is inherent in the Court of Appeals position. The *Larson* case did not involve the construction by the officer of his own terms of authority. Here, an executive officer is held empowered to determine what powers Congress gave him and if he erred in that determination it is held there is no way of preventing his unwarranted action. Surely, there should be very clear language on the part of Congress before it is determined that it intended to by-pass the judiciary and to give such unbridled freedom to the Administrator. In the *Larson* case the statute gave the Administrator virtually unlimited powers to conduct a sales program as to personalty—to sell "to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act" (Surplus Property Act, etc., Sec. 4, 50 U. S. C. App. sec. 1613). The statute contained virtually no limitations on these broad powers. The Administrator, acting within these broad powers, construed a contract which he had made. This Court denied an injunction, holding that construction of a contract, right or wrong, was within the scope of his authority. That is a far cry from a holding that it is immaterial whether he is right or wrong in determining what the scope of his statutory authority is.

In the *Larson* case this Court distinguished, time and again, the authorized act of an officer and the act which was contrary to statute. When "The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden * * * His actions are *ultra vires* his authority and therefore may be made the object of specific relief" (337 U. S. at 689). But the Court of Appeals says that here

respondents were authorized because Congress gave respondents the authority to construe the statute. We respectfully submit a) that the statute gives no such authority and b) that the *Larson* rule would not apply, in any event, to an officer who "construes" his own authority into something at variance with Congress' mandate.

B. Congress delegated to the Administrator the power to make determinations of fact, not of law.

From the beginning, Congress made very specific and meticulous provisions with respect to real property.

In 1944, the only exceptions made in Section 23 were "war housing, industrial plants, factories, or similar structures and facilities, or the sites thereof, or land which the Board determines is essential to the use of any of the foregoing (App. A, *infra*, p. 1a). Thereunder, respondent Larson's predecessor, General Gregory, denied preferences to former owners of hotels on the ground that hotels were "similar structures and facilities" to industrial plants and factories. This, obviously, was not the intention of Congress and the statute was accordingly amended in 1946. The House Committee wrote:

> "In the opinion of the Committee, this interpretation is wholly unjustified, but the fact that it has been made and has not been changed requires that Section 23(a)(1) of the act be re-written so that it cannot be misunderstood."*

Congress then separated sharply properties which should go back to the former owners and those which should not, and the amended section reads as follows:

> "As used in this section—
>
> (1) The term 'real property' means property consisting of land, together with any fixtures and improvements thereon (including hotels, apartment houses, hospitals, office buildings, stores, and other

* House Misc. Reports, 79th Cong. 2nd Sess., Vol. IV, Rep. No. 2337, p. 2.

> commercial structures) located outside the District of Columbia, but does not include (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing; and"

There are several significant aspects to that paragraph. First, Congress, in clear words, divided those matters in which the Administrator's judgment was to apply from those where no judgment was applicable. Congress could have said in subdivision (B) "commercial structures which have been made an integral part of a functional or economic unit which should be disposed of as a whole"; and it could have said "land which is essential to the use of any of the foregoing". But it did not say that; it said "commercial structures which the Administrator determines have been made an integral part, etc." and "land which the Administrator determines essential etc.". If such a broad grant of power as the Court of Appeals assumes had been made, these clauses would have been wholly unnecessary. Second, both those matters in which his determinations are final are factual. It is a matter of judgment, not of definition, whether buildings should be sold together or whether additional land is needed in connection with the structures. Third, Congress used as specific terms as it could; where it used a general term—"commercial"—it went out of its way to label the kinds of commercial properties which came to mind: "hotels, apartment houses, hospitals, office buildings, stores".

Certainly, no power to make new definitions can be deduced from this paragraph. The Administrator was given the usual administrative powers to determine factually

whether properties fell within accepted definitions of terms used by Congress, not the extraordinary power to change the usual meaning of terms used by Congress.

The Court of Appeals draws its conclusions as to a broad grant of authority from the authority given the Administrator in Sec. 23(c) to classify property (App. A, *infra*, p. 2a) and from the term "similar structures and facilities". But a brief reference to the section and its history will show the conclusion is not justified.

As the act stood originally in 1944 he was directed to classify only "as agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable". This was due to the historical background of the Senate bill in which, as originally drawn, agricultural land was to be disposed of by the Secretary of Agriculture, grazing and forest land by the Secretary of Interior, and mineral rights were always to be reserved to the Government.* Also, certain preferences in the final Act applied to agricultural land.** It should be noted that he was not told to classify properties as industrial or war housing for Congress did not suspect difficulties would arise there any more than if it had said "Buick automobiles" or " Chase National Bank branches."

In 1946, as the Court of Appeals points out, the statute was amended so that the Administrator was directed to classify property based on its "highest and best use" at the time it was reported surplus and he was so directed to classify even though that determination might make the property Section 23 or non-Section 23 property. The origin of the "highest and best use" clause appears clearly in the report of the House Committee. When Congress was ready to make sure that hotels should be turned back to their former owners, Gen. Gregory defended his opposition by saying that in many instances hotel properties had been

> "largely converted to hospitals, which conversion necessitated alterations entirely changing the char-

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* S. 2065 (1944).
** App. A, p. 3a. Also Sec. 23(e) and (i).

> acter of the building and rendering it unsuitable for its former use without extensive additional alterations".*

Thus, he pointed out that the government would have to surrender a hospital which the owner never had and it would have to allow him on the price the cost of reconverting to a hotel. That is how the "highest and best use at the time it is reported as surplus" came into the Act. The Administrator was directed to apply the Congressional mandate in accordance with the definition into which the property fit at the time it was declared surplus and not when taken.

That command of Congress has no application here. We do not deny that if it was "war housing" in 1947, petitioners had no preference though it was vacant land in 1942. The "highest and best use" in 1947, a year of peace and continued demobilization, was not for "war housing" and there is no evidence that Congress gave respondents the power to say it was.

Again, the Court says that if respondent Larson could not call it "war housing" he might reasonably call it "similar structures and facilities" under the clause which excepted

> "war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities" (Sec. 23(d)).

The shortest and best answer to this is the action of respondent Larson and his predecessor, General Gregory.

General Gregory defined "similar structures and facilities" as follows:

> " 'Similar structures and facilities' as used above shall include structures and facilities classified by the Administrator as (i) commercial, (ii) roads and local transportation, (iii) airport, (iv) railroad,

* House Misc. Reports, 79th Cong. 2nd Sess., Vol IV, Rep. No. 2337 (pp. 3-4).

transportation and pipe line, (v) utility and communications and (vi) institutional where there are improvements which render the property suitable for disposition and use for health or educational purposes" (11 Fed. Reg. 2644-5).

Respondent defined "war housing and similar structures and facilities" as follows:

> "f. (3) *War Housing and Similar Property.* War Housing and similar structures and facilities, and the sites thereof and land which is determined to be essential to the use of such property.
>
> 'War Housing' means real properties improved with housing structures, acquired or constructed by the Government subsequent to September 8, 1939, either (1) for the purpose of housing servicemen, war workers, and their families, or (2) by the use of such funds earmarked or appropriated for the housing of persons engaged in national defense activities, and their families" (R. 62).

It will be noted that respondent's definition of "war housing and similar structures and facilities" is verbatim his definition of "war housing" (*infra*, pp. 22-3). In other words, respondent well realized that "war housing" was war housing and that the phrase "similar structures and facilities" modified factories, etc. but did not modify the term "war housing".

This case is similar to *United States* v. *Idaho*, 298 U. S. 105 (1936). In question was the Interstate Commerce Act which gave the I. C. C. jurisdiction to authorize abandonment of tracks other than "spur * * * tracks, located * * * wholly within one State". The I. C. C. determined that the track was a "branch" and not a "spur" and allowed abandonment. An injunction was granted by this Court on the ground that no such power to construe the

act of Congress had been given to the I. C .C. Mr. Justice BRANDEIS wrote at page 109:

> "Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive."

But, the Court concluded differently, continuing:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

In sum, the Court of Appeals has assumed (a) that Congress gave the Administrator authority to determine his own jurisdiction and (b) that this Court's opinion in the *Larson* case immunizes an error on his part in determining his jurisdiction from specific relief. We submit that both are wrong and that both, particularly the latter, justify certiorari.

C. Here respondent was acting clearly outside the scope of his authority.

"War housing" is a term of clearly established meaning. It has been so often defined, by respondent Larson as well as by others, that its meaning is not in doubt.

For example, Senate Report 1286, which accompanied the Housing Act of 1950, contrasts "war housing" with the property here involved. Under "Disposal of War and Veterans' Housing" that Report reads:

> "The *war housing was construction* with Federal funds under the authority of the Lanham Act (Public Law 849, 76th Cong., as amended), and related statutes, *during the war and the immediate prewar period* for the purpose of providing accommodations for workers in essential war and defense industries. * * * All of the war housing was owned by the Government, which was responsible for its operation and management."
>
> * * * *

> "The *temporary veterans' reuse housing was provided just after the war* under the authority of Title V of the Lanham Act as a temporary expedient to meet the housing needs of veterans and their families. Most of this housing was produced through the moving and conversion of temporary war housing and barracks buildings, either by the Federal Government or by the municipalities, educational institutions and non-profit organizations to which they were made available." (Italics ours.) (2 U. S. Cong. Serv. of 1950 at p. 2048.)

In fact, if this were "war housing" it would not be in respondents' hands for disposition. The following colloquy on the Senate floor preceded adoption of the Act in 1944:

> "Mr. Pepper. Mr. President, I am not sure I did not overlook the provision about war housing. Is that covered by the terms of the Lanham Act?
>
> Mr. Johnson of Colorado. Yes, it is. War housing will be handled by its own agency and will be excluded from the matter of surplus property disposal under the Bill" (90 Cong. Rec. 7936).

The exception of "war housing" was inserted on the suggestion of John B. Blandford, Jr., National Housing Administrator, who advised the Committees in charge that unless "war housing" were excepted from the Surplus Property Act, the latter would be in conflict with the Lanham Act and the two administrators would have jurisdictional problems because Congress had provided for the method of disposition of "war housing" by the Housing Administrator when it had originally appropriated funds for the erection of "war housing".*

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* "Summary of Recommendations Submitted on Surplus Property Legislation" by War Contracts Committee to Senate Committee on Military Affairs, 78th Cong., 2nd Sess., Senate Subcomm. Print No. 5, June 5, 1944 and Hearings before Subcomm. of the Comm. on Public Bldgs. and Grounds, H. Rep., 78th Cong., 2nd Sess. "Bills relating to Disposition of Surplus Property", p. 3.

President Roosevelt, in 1942 (88 C. R. 4656) and in 1943 (89 C. R. 4396), in Messages to Congress had referred repeatedly to "war housing" as housing built "in time of war", in "areas of expanding war production", "in relation to the whole war effort".

"War housing" is not an unfamiliar sight. It consists of certain very definite types built between 1940 and 1945 to aid in prosecution of the war. As set forth in the Lanham Act, Act of Oct. 14, 1940, c. 862, sec. 1, 54 Stat. 1125, 42 U. S. C., sec. 1521, appropriations were for dwellings

> "in those areas or localities in which the President shall find an acute shortage of housing exists or impends which would impede national defense activities".

Its rows of multi-family dwellings appear at munitions and war-time industrial centers where labor gravitated from peace-time domiciles. Its apartments are readily discernible in Washington, where Government employees multiplied during the war. Its individual houses are clearly distinguished near military camps where officers' families were quartered near installations previously undeveloped.

The post-war emergency legislation which permitted local governments temporarily to utilize barracks was sponsored by Senator Mead.* Both he and Representative Lanham, in the debates on that legislation carefully distinguished "war housing" from "temporary reuse housing" (91 C. R. 11,624-5, 12,303-4).

By respondent's own definition in his Regulations this is not "war housing":

> " 'War housing' means real properties improved with housing structures, acquired or constructed by the Government subsequent to September 8, 1939, either (i) for the purpose of housing servicemen, war workers, and their families, or (ii) by the use

* Act of Dec. 31, 1945, c. 657, 59 Stat. 674, 42 U. S. C. Sec. 1572.

of funds earmarked or appropriated for the housing of persons engaged in national defense activities, and their families" (11 Fed. Reg. 2644).

This housing was neither constructed nor acquired by the Government. It was for veterans, not for servicemen and their families or war workers and theirs; nor was it built with funds earmarked for persons engaged in national defense activities and their families.

D. The fact that it may be said that respondent did not act unreasonably has no bearing on whether the suit is against the United States.

The Court of Appeals shows at length why "We do not think the action taken by appellees was unreasonable" (R. 81) and why it was not "a capricious exercise of power" (R. 82). The reasonableness is said to lie in the breadth of power given to the Administrator. But unless that power is so broad as to allow the officer to nullify the act of Congress, how such reasonableness can alter the situation we cannot perceive.

In *Miguel* v. *McCarl*, 291 U. S. 442 (1934), the disbursing officer relied on an opinion of the Controller General that payment "is not authorized even by the remotest implication of the laws" (p. 449). Presumably, then, his refusal to pay could not be said to be based on an unreasonable construction of the Statutes. Yet, this Court, reading the Statutes differently, issued mandamus directing him to pay from the Government treasury.

In *Santa Fe, etc.* v. *Fall*, 259 U. S. 197 (1922), this Court, through Mr. Justice HOLMES, agreed that "at first sight" the words of the Statute "might be taken to sustain the decision below, but, upon consideration, they seem to us not to have that effect" (p. 199). This Court enjoined the Secretary from his proposed action with respect to land of the United States because his reading of the Statute was wrong, whether or not it was reasonable.

In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), Mr. Justice FRANKFURTER wrote:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the court does come into play, an order may not stand if the agency has misconceived the law."

In *Colgate-Palmolive-Peet* v. *N. L. R. B.*, 338 U. S. 355, 363 (1949), Mr. Justice MINTON wrote:

> "To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the Statute not placed there by Congress."

The fact that the statute, in other respects, leaves discretion in the officer does not remove the question of law from the reviewing power of the Court. As Mr. Justice JACKSON wrote in *Arenas* v. *U. S.*, 322 U. S. 419, 432 (1944):

> "But courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. * * * Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise, unreviewable discretion may become subject to correction. *Perkins* v. *Elg*, 307 U. S. 325, 349, 83 L. ed. 1320, 59 S. Ct. 884."

In *Land* v. *Dollar* and again in the *Larson* case, this Court recognized that sometimes a preliminary determination must be made before it can be said whether a suit is or is not against the United States. Here the determi-

nation to be made is whether respondent acts within or without the Statute. If without it, his reasonableness is immaterial to the determination of whether this is a suit against the United States.

Miguel v. *McCarl*, 291 U. S. 442 (1934);
Santa Fe, etc. v. *Fall*, 259 U. S. 197 (1922).

POINT III

The matter may be fully disposed of on appeal.

Below, respondents contended that they acted within the Statute. That may be disposed of on the second question on which we seek certiorari.

The only remaining question is whether expiration of the Surplus Property Act while this action was pending, terminated the rights petitioners had when they commenced this suit. The Court of Appeals did not pass on that question (footnote 8, p. 3). We respectfully pray that that question be decided on appeal here so that the whole case may be ended.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioners.

April 20, 1951.

[APPENDIX FOLLOWS]